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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~950~~ 100

KOPPERS COMPANY, INC.,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal from the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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COMMONWEALTH OF PENNSYLVANIA,

Appellee.

Appeal from the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

Appellant, Koppers Company, Inc., appeals from the final judgment of the Supreme Court of Pennsylvania, affirming the judgment of the court below, which sustained the constitutionality of the state tax statute as construed and applied in assessing corporate net income tax (an excise tax) against appellant for the year 1953; and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

A. OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania is reported in 397 Pa. 523, 156 A. 2d 328 (November 24, 1959), and is printed in Appendix B hereto.

The opinions of the trial court, Common Pleas of Dauphin County, Pennsylvania, entering judgment nisi and overruling of exceptions, are included at pages 113a and 163a of the printed Pennsylvania Supreme Court Record (hereinafter referred to as "R") filed herewith. The opinion of the trial court in the companion case of *Commonwealth v. Rockwell Manufacturing Company,* referred to in its judgment nisi opinion in the instant case, is included, also, in said Record at page 118a.

B. JURISDICTION.

The grounds on which the jurisdiction of this Court is invoked are:

(i) This action by appellant, a Delaware corporation authorized to do business in Pennsylvania, was brought under the provisions of Section 1104 of the Fiscal Code of Pennsylvania, 72 Pennsylvania Purdon's Statutes, § 1104, and challenged the validity of a statute of the Commonwealth of Pennsylvania on the ground of its being repugnant to the Constitution of the United States because the make-up of the gross receipts allocation fraction part of the apportionment formula was inherently arbitrary, discriminated against U. S. obligations, and produced an unconstitutional result. A decision on this point was necessary to the determination of the case. The final judgment and decision of the Supreme Court of Pennsylvania, the highest state court in which a decision in the suit could be had, were in favor of the statute's validity. Accordingly, this Court has jurisdiction upon appeal to review the judgment in question. *Standard Oil Company of California v. Johnson,* 316 U. S. 483; 86 L. Ed. 1611.

(ii) The judgment of the Supreme Court of Pennsylvania, review of which is sought by this appeal, was dated and filed November 24, 1959, and was made final on December 31, 1959, by the refusal by said Court of appellant's petition for reargument. (Appendix C, p. 37). Notice of appeal was filed March 28, 1960 in the Supreme Court of Pennsylvania.

(iii) The statutory provisions conferring jurisdiction of the appeal on the Supreme Court of the United States are to be found in 28 U.S.C. §§ 1257 (2) and (3) and 2103.

(iv) The following cases sustain the jurisdiction of the Supreme Court of the United States to review the judgment on appeal in this case:

Question 1.

Wallace v. Hines, 253 U. S. 66, 40 S. Ct. 435 (1920).

Fargo v. Hart, 193 U. S. 490, 24 S. Ct. 498 (1904).

People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 231 N. Y. 516 (1920); cert. den. 256 U. S. 702.

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45 (1920).

Butler Bros. v. McColgan, 315 U. S. 501, 62 S. Ct. 701 (1942).

Question 2.

Society for Savings in City of Cleveland v. Bowers, 349 U. S. 143, 75 S. Ct. 607 (1955).

Smith v. Davis, 323 U. S. 111, 117; 65 S. Ct. 157 (1944).

Commonwealth v. Curtis Publishing Co., 363 Pa. 299, 69 A. 2d 410 (1949); cert. den. 339 U. S. 928, 70 S. Ct. 627.

Question 3.

Newark Fire Insurance Co. v. State Board, 307 U. S. 313, 319, 320; 59 S. Ct. 918 (1939).

State Statute Involved.

(v) The validity of the following Pennsylvania statute, as construed by the Supreme Court of Pennsylvania, is involved: Sections 2 and 3 of the Corporate Net Income Tax Act of May 16, 1935, P. L. 208, as re-enacted and amended by the Act of December 27, 1951, P. L. 1746, 72 Pennsylvania Purdon's Statutes, §§ 3420b and 3420c. The text of the pertinent provisions of said sections is set forth in Appendix A hereto.

C. QUESTIONS PRESENTED.

1. Where gross proceeds from maturities of investment and reinvestment in U. S. Treasury 91-Day Bills were not used in appellant's business operations and the interest earned thereon was not included in the tax measure, consisting entirely of net income from business operations, does the use of such gross proceeds and interest as gross receipts in the make-up of the gross receipts allocation fraction, which is applied to apportion one-third of the tax measure, make that fraction inherently arbitrary and produce an unconstitutional result in violation of the due process of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

2. Does such use of such gross proceeds and interest from U. S. Treasury 91-Day Bills, which produces tax liability of $53,026.23 as compared with interest of approximately $240,156 earned thereon, discriminate against these obligations of the United States Government in violation of Article VI, Clause 2 and Article I, Section 8, Clause 2 of the Constitution of the United States?

3. Did the state courts err by excluding as irrelevant and immaterial the facts agreed to by the parties in Paragraphs 6(c), 6(d), 10, 12, 15, 17 and 19 of, and in Exhibits "E", "F", "F-1", "F-2", "F-3", "G", "H" and "I"

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attached to, the Stipulation of Facts (R. 48a-57a, 62a-76a), which purported to prove the inherent arbitrariness of the makeup of the gross receipts allocation fraction used in the apportionment formula?

D. STATEMENT OF THE CASE.

(1) The Statute; Nature of Tax; and Tax Formula.

Section 3 of the Corporate Net Income Tax Act (Appendix A) imposes on domestic corporations and on foreign corporations doing business in Pennsylvania for the privilege of doing business, or having capital or property employed, in the state, an excise tax upon each dollar of net income received by, and accruing to, such corporation during the calendar year 1953.

The nature of the tax is not in dispute. It is not a tax for the privilege "to do" business in Pennsylvania. For the purposes of this case, it is conceded to be an excise tax imposed for the privilege of transacting an intrastate business in Pennsylvania[1] measured by net income (received and accrued in the tax year) as defined in the statute and as modified by court decision.[2]

The tax apportionment formula is as follows:

1. If the corporation transacts its entire business in Pennsylvania, the tax measure is "net income as returned to and ascertained by the Federal Government" (taxable Federal income) less deduction for dividends received (statute) and less deduction for interest received on United States securities[2] in order to avoid discrimination because interest from state and municipal obligations is not included in Federal taxable income.

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[1] *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 184 A. 37 (1936).

[2] *Commonwealth v. Curtis Publishing Co.*, 363 Pa. 299, 69 A. 2d 410 (1949); cert. den. 339 U. S. 928.

2. If the corporation does *not* transact its entire business in Pennsylvania, the tax measure is Federal taxable income less (a) dividends received, (b) interest received on United States securities, and (c) a further deduction for gains from sale or exchange of tangible assets (those arising out of Pennsylvania are excluded and those arising in Pennsylvania are added in their entirety to apportioned income to constitute the tax base or taxable income). The remainder of net income, referred to in tax parlance as the "tax measure" or "Net Income To Be Allocated" is then divided into equal parts. The statute provides that such portion of each third "shall be attributed to business carried on in the Commonwealth" as shall be found by multiplying each third by an allocation fraction:

(i) To one-third, a tangible property fraction—taxpayer's tangible property situated in Pennsylvania over its tangible property everywhere.

(ii) To one-third, a wages fraction—wages and salaries paid to employees in Pennsylvania over total wages and salaries.

(iii) To one-third, a gross receipts fraction—gross receipts *"from business assignable to this Commonwealth as hereinafter provided"* over "the amount of the taxpayer's gross receipts from all its business."

It is only the gross receipts fraction which is at issue in the instant case and the statute provides for its make-up (Section 2.2(c) (3)) as follows:

> "The amount of the corporation's gross receipts from business assignable to this Commonwealth shall be, (1) the amount of its gross receipts for the taxable year except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with, or sent out from, premises for the transaction of business maintained by the taxpayer outside of the Commonwealth, and except rentals and royalties, and interest and dividends, (2) rentals or

royalties from property situated, or from the use of patents, within this Commonwealth, and (3) dividends and interest, except such dividends and interest attributable to the business conducted on premises maintained by the taxpayer outside the Commonwealth."

Three things should be noted in respect to the three allocation fractions:

1. The sum of the results of these three fractions is the amount of net income attributed to business carried on in Pennsylvania; and this sum, together with any gains from sale of tangible assets in Pennsylvania, is the tax base or taxable income to which the tax rate is applied.

2. The term "gross receipts" is not denned in the statute.

3. Although dividends and interest, including interest from United States securities, are to be included in the make-up of the gross receipts fraction, dividends, and interest from United States securities, are required by the statute and court decision *to be excluded* from the "tax measure" or "Net Income To Be Allocated."

(2) History of the Case.

Appellant, a Delaware corporation, is registered and qualified to do business in Pennsylvania. Its principal business office is located in Koppers Building, Pittsburgh, Pennsylvania, where its principal officers are located; its shareholders and directors meet; its books, principal bank account and stock and bond investments are kept, and, at and from which, its business operations and financial transactions are conducted. Its business operations within and without Pennsylvania consisted of construction work and the manufacture and sale of chemicals, coke and by-products from coal (R. 45a). Its plant facilities were located in and out of Pennsylvania (Commonwealth's Exhibit No. 1—1953 Corporate Net Income Tax Report). Its finan-

cial transactions consisted, inter alia, of investment and reinvestment in stocks and bonds, making changes therein by maturity, sale and purchase, and receipt of dividend and interest income thereon (Commonwealth's Exhibit No. 1, R. 16a, 48a, 62a-72a).

It is stipulated by the parties that appellant was not engaged in the business of buying and selling stocks of other corporations, obligations of the United States and State and Municipal obligations (R. 57a).

In the assessment of Corporate Net Income Tax of $382,592.02 (R. 29a, 30a), six disputed gross proceeds and gross income items were included in the make-up of the gross receipts allocation fraction (R. 53a). It is stipulated by the parties that none of the gross proceeds or income or gains in respect to the six items was included in the "tax measure" or "Net Income To Be Allocated" in the amount of $22,013,543.45 which was derived exclusively from appellant's construction and manufacturing business (R. 49a-53a); that the tax effect of including, as compared with excluding, the six disputed items in the make-up of the gross receipts fraction produced an increase in the taxable percentage of that fraction by 14.0021% or by an increase of 4.6673% in the taxable average percentage of the *three* allocation fractions (Appendix D, Line 12; Appendix B, p. 25) and assigned to Pennsylvania taxable income of $1,027,452.77 "attributed to business carried on" in Pennsylvania on which the tax amounted to $51,372.63 (Appendix D, Line 12). The proportion of this tax amount, excluding only gross proceeds of $47,726,256 and interest of $240,156, which are at issue in this appeal, is $35,510.90 (Appendix D, Line 15).

The tax effect of inclusion of the six items only (no comparison with exclusion which reduces the fraction percentage) assigned to Pennsylvania taxable income of $1,445,852.62 on which the tax is $72,292.63 (Appendix D, Line 9).

Although appellant, in the proceedings in the trial

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court and in the Supreme Court of Pennsylvania, based its contentions upon the inclusion of *all six disputed items* in the make-up of the gross receipts allocation fraction, it is limiting its appeal to this Court, for simplification purposes, only to gross proceeds of $47,726,256 from maturities of U. S. Treasury 91-Day Bills and interest of $240,156 thereon out of total maturities of $63,679,567 and total interest of $320,432.21 (R. 48a, 60a, 62a).

In respect to the limited appeal, the parties have stipulated that none of the gross proceeds or interest thereon has been included in "Net Income To Be Allocated" (R. 49a-53a); and that average capital of $11,944,980 invested and reinvested continuously throughout the year 1953 produced, through maturities, gross proceeds of $47,726,256 which were not used in appellant's construction and manufacturing business during 1953 (R. 49a, 71a).

The tax effect of including in the numerator of gross receipts fraction Pennsylvania gross receipts of $76,354,246.75 from construction and manufacturing business assigns to Pennsylvania taxable income of $1,688,167.28 on which the tax is $84,408.36 (Appendix D, Line 8); and, by way of comparison, the tax effect of including in the numerator of this fraction the said gross proceeds of $47,726,256 and interest of $240,156 thereon assigns to Pennsylvania taxable income of $1,060,524.60 on which the tax is $53,026.23 (Appendix D, Line 10) or 62.82% as much.

Insofar as the limited appeal to this Court is concerned, appellant protested the validity of the Pennsylvania statute on the grounds (1) that, since the gross proceeds of $47,726,256 from conversion and maturities of investment and reinvestment in U. S. Treasury 91-Day Bills were *not used* in its construction and manufacturing business and the interest of $240,156 was not included in the "Net Income To Be Allocated", which consisted wholly of income from construction and manufacturing business, they were not representative of activities or capital producing "Net Income To Be Allocated" and had no relation

thereto; and, therefore, their use in the make-up of the gross receipts allocation fraction made that fraction inherently arbitrary, thereby producing an unconstitutional result by assigning to Pennsylvania as taxable income, income which arose from construction and manufacturing business conducted outside of Pennsylvania; (2) that the mere fact of ownership by appellant of U. S. Treasury 91-Day Bills *increased its tax* burden, thereby discriminating against said obligations; and (3) that admitted facts purporting to prove the inherent arbitrariness of the gross receipts allocation fraction were held to be irrelevant and immaterial.

The state court overruled appellant's first protest on the grounds that it is appropriate to use said gross proceeds and interest thereon in the make-up of the gross receipts allocation fraction *because they constitute corporate activities* (reserve capital) and they need not be representative of activities or capital producing "Net Income To Be Allocated" and need have no relation thereto; that the three statutory allocation fractions used in the Pennsylvania apportionment formula have been held by this Court to be reasonable; that, in the allocation of multiple state income of a corporation, it is contemplated that there will be an overlapping and taxation of more than 100% of income; and that proof by appellant of the increase of the taxable percentage of the gross receipts fraction from 28% to 42% or an increase of 4.6% in the composite percentage of the three allocation fractions by reason of the use of said gross proceeds and interest thereon does not constitute a showing that "this change produces an allocation of income to Pennsylvania so disproportionate to the actual income attributable to the state that it is inherently unreasonable."

The state court overruled appellant's second protest on the grounds that the Pennsylvania statute does not tax income from federal securities and that gross proceeds from

all investments, including federal securities, were included in the make-up of the gross receipts allocation fraction.

The state court overruled appellant's third protest on the ground that, in view of the legal conclusions arrived at, it was not necessary to consider the admitted facts offered by appellant to prove that the gross receipts fraction as constituted was inherently arbitrary.

(3) How the Federal Questions Were Raised.

The issues involved in the three questions presented on appeal to this Court were raised from the inception of litigation in the instant case:

These issues were raised by appellant (a) in its Appeal and Specification of Objections from the tax assessment (Paragraphs (2) (a), (b), (c) and (d); (3) (a) and (b); and (5) (a) and (b)—R. 6a, 7a, 8a, 9a), which were overruled by the trial court in its judgment nisi opinion (R. 113a-117a); (b) in its exception thereto (Nos. 9, 21, 22, 23, 24, 27, 29, 32, 33, 37, 38, 42, 43, 45, 60, 63, 64, 65, 66, 67, 68, 69, 72, 73, 74, 76, 77, 78, 80, 81, 87, 88—R. 129a, 133a-144a, 150a-159a, 162a), which were overruled by the trial court (R. 163a); (c) in its questions presented on appeal to, and overruled by, the Supreme Court of Pennsylvania (Appendix B, pp. 23-31); and (d) in its Petition to that Court for Reargument, which was dismissed (Appendix C, pp. 32-37).

E. FEDERAL QUESTIONS ARE SUBSTANTIAL.

(1) Inherent Arbitrariness of Gross Receipts Fraction and Violation of Due Process.

This issue presents a substantial federal question. It brings up for review by this Court the question of whether, by reason of its *particular* apportionment formula, which is alleged to be inherently arbitrary, the Pennsylva-

nia corporate net income tax is based upon extra-territorial values.

In theory at least, Due Process limits a state's taxing power to things, property, activities, income, and privileges, within its borders. Where a corporation is engaged in business in more than one state, it is the tendency of the states, in exercising their powers of taxation, to encroach upon extra-territorial values; and it appears to be the tendency of the courts to refuse to apply the brakes. Many such taxpayers feel that their rights under due process are no longer protected and that they are subjected to "taxation without representation."

The problem arises when this Court approves generally a state apportionment formula[3] or the concept of "unitary business"[4] applicable to the multi-state operations of a corporation; and then a particular state may make modifications in the formula or apply the concept loosely in different facts and circumstances and cite the decisions of this Court as approving the modified formula without regard to the differences in result.

In the *Underwood* case, this Court approved an apportionment formula consisting of a single allocation fraction of tangible property which was held to be representative of major income producing factors; and, in the *Butler Bros.* case, this Court approved an apportionment formula consisting of three allocation fractions of tangible property, payroll and gross receipts, *which, after excluding the factors of investment income and gross proceeds,* were held to "be deemed to reflect the relative contribution of the activities in the various states to the *production* of the total unitary income" (315 U. S., p. 509) and where "*the propriety of the use of the formula is not questioned* if by

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[3] *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113, 41 S. Ct. 45 (1920). *Butler Bros. v. McColgan,* 315 U. S. 501, 62 S. Ct. 701 (1942).

[4] *Wallace v. Hines,* 253 U. S. 66, 40 S. Ct. 435 (1919).

reason of the stipulated facts a formula for allocation to California is proper" (p. 505) (Emphasis supplied).

In the instant case, substantial investment gross proceeds and interest are included in the make-up of the gross receipts allocation formula under a stipulation that *they did not contribute* to the production of "Net Income To Be Allocated" which was used as the "tax measure"; and, furthermore, the propriety of the use of the formula is questioned. It is submitted that the substantial difference between the apportionment formulae approved by this Court in *Underwood* and *Butler Bros.* and the Pennsylvania apportionment formula make the latter inherently arbitrary and that this, together with the questioning of the propriety of the use of the Pennsylvania formula, should cause this Court to note jurisdiction in the instant case in order to determine the validity of the Pennsylvania statute.

The concept of "unitary business" in *Wallace v. Hines*[5] was used originally to explain why it is possible for a formula to apportion to a state value reasonably to be considered as *within the state* in an amount in excess of the value of the assets within the state considered separately from the unitary business of which they were a part. Today, the term is used to create an aura of reasonableness over *any particular formula* adopted by a state however arbitrary and unsound. Mr. Justice Holmes in *Fargo v. Hart*[6] warned, some sixteen years before *Wallace v. Hines,* that it might be misused. He said that it "may be made the means of unlawfully taxing a privilege or property outside the state under the name of enhanced value or good will if it is not confined to its true meaning" (p. 500), and later in his opinion, he said that to misuse it so "would be taxing property outside of the state under a pretense" (p. 500).

And that is the precise situation in the instant case. Under the aura of the *reasonableness* of the apportion-

[5] 253 U. S. 66, 40 S. Ct. 435 (1919).
[6] 193 U. S. 490, 24 S. Ct. 498 (1903).

ment formula based upon the arbitrary holding that anything that constituted corporate activity could be used as an allocation factor, substantial investment gross proceeds and interest which had nothing to do with the production of construction and manufacturing income which comprised the "Net Income To Be Allocated" were included in the make-up of the gross receipts allocation fraction to draw into Pennsylvania extra-territorial values, just as in the *Fargo* and *Hines* cases (whether property or excise tax) it was held that the portion of the mileage ratio of railroad lines in a plains state, when applied to bond values in another state which had no relation to railroad value in the taxing state, produced an unconstitutional result—not merely an overvaluation but an inherently arbitrary apportionment formula under the circumstances.

The inherent arbitrariness of the apportionment formula (gross receipts portion) in the instant case is due to its arbitrary construction.[7] In the *Knapp* case, the New York statute made privision for apportionment of business income *including dividends and interest* by an allocation formula consisting of segregated classes of assets which failed to include the value of interest-producing bonds and ninety per cent of the value of dividend-paying stocks. The Court held that the formula as applied to the type of income involved was inherently arbitrary and produced an unconstitutional result by drawing extraterritorial values into the state because representation was not given in the formula to the stocks and bonds producing the income to be allocated. In the instant case, inherent arbitrariness exists in the statutory apportionment formula as construed by the Supreme Court of Pennsylvania because there *are* included in the gross receipts fraction portion of the formula substantial investment gross proceeds and interest *which did not produce,* or *contribute to the production of,* "Net Income To Be Allocated."

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[7] *Commonwealth ex rel. Alpha Portland Cement Co. v. Knapp,* 230 N. Y. 48, 231 N. Y. 516 (1920); cert. den. 256 U. S. 702.

Mr. Justice Frankfurter, in a footnote to his dissent in *Braniff Airway Inc. v. Nebraska,*[8] stated that the apportionment formula must be examined from a *practical* standpoint to insure its fairness.

In the instant case, continuous investment and reinvestment of average capital of $11,944,980 produced maturities gross proceeds of $47,726,256 and interest of $240,156 thereon, which were *not* used in appellant's construction and manufacturing business and which *did not* contribute to the production of "Net Income To Be Allocated," consisting entirely of net income from the construction and manufacturing business. The use of these gross proceeds and interest in the make-up of the gross receipts allocation fraction portion of the Pennsylvania apportionment formula assigns to Pennsylvania taxable income of $1,060,524 [9] attributed to the construction and manufacturing business conducted in Pennsylvania, which is 62.82% as much as the taxable income of $1,688,167 which is assigned to Pennsylvania by using the entire Pennsylvania gross receipts from construction and manufacturing. The taxable income assigned to Pennsylvania by using the gross proceeds and interest in the gross receipts allocation fraction is one-fifth of the capital invested and ten times the interest earned thereon. According to the Supreme Court of Pennsylvania, this result is reasonable merely because the investment in U. S. Treasury 91-Day Bills is reserve capital and constitues a "corporate activity." The approval by this Court of this result as not being inherently arbitrary will deny to appellant any rights under Due Process.

(2) Discrimination against United States Obligations.

In *Smith v. Davis* [10] (p. 117), it is said that the purpose of immunity of Federal securities from state taxa-

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[8] 347 U. S. 590, 74 S. Ct. 757 (1954).

[9] See Appendix D, Line 10.

[10] 323 U. S. 111, 65 S. Ct. 157 (1944).

tion is "to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit."

In *Commonwealth v. Curtis Publishing Co.*,[11] the court said (p. 311):

> "It necessarily follows from the immunity created by federal authority that a state may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities."

The tax effect of ownership of U. S. Treasury 91-Day Bills, in the instant case, is compounded because of maturity and reinvestment every 91 days. Thus, average capital of $11,944,980 produced maturities of $47,726,256. Suppose appellant had invested $11,944,980 in a long-term bond of a business corporation which did not mature during the year. Even though the bond were held as a capital reserve, *there would be no tax burden by reason of that ownership.* Suppose that bond had matured once during the year, the tax burden, under the state court's theory, would be only one-fourth as much as the tax burden imposed by reason of ownership of the 91-Day Bills. Under the circumstances, can it be said that the investment attractiveness of the 91-Day Bills is not diminished and that Federal securities are not discriminated against?

The Supreme Court of Pennsylvania ruled that Federal securities were not taxed because the Pennsylvania tax is an excise tax and yet this Court has held that the rule of immunity has been carried forward to embrace "indirect taxation" of such obligations.[12]

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[11] 363 Pa. 299, 69 A. 2d 410 (1949); cert. den. 339 U. S. 928, 70 S. Ct. 627.

[12] *Society for Savings in City of Cleveland v. Bowers*, 349 U. S. 143, 75 S. Ct. 607 (1955).

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(3) Proof of Arbitrariness of Apportionment Formula.

Where, as in the instant case, appellant has asserted a federal right under Due Process, the duty devolves on this Court to inquire into the evidence relating to the right asserted.[13]

The Supreme Court of Pennsylvania ruled that appellant had not met the burden of proving that the increase in the taxable percentage of the gross receipts allocation fraction by reason of the use of investment gross proceeds and interest therein "produces an allocation of income to Pennsylvania so disproportionate to the actual income attributable to the state that it is inherently unreasonable." This is "tangled underbrush" language and is a misconception of the federal right asserted by appellant under Due Process. Appellant does not contend that the result of the Pennsylvania apportionment is "mere overvaluation," that is, a palpably disproportionate allocation of income which bears no relationship to income reasonably attributable to business conducted in Pennsylvania as in the cases of *Hans Rees' Sons v. North Carolina*[14] and *International Harvester Co. v. Evatt.*[15] On the contrary, appellant's asserted right under Due Process is based upon its contention that the use of substantial investment gross proceeds and interest thereon in the make-up of the gross receipts allocation fraction makes the Pennsylvania apportionment inherently arbitrary and that it is this inherent arbitrariness per se which produces an unconstitutional result.

Therefore, the Supreme Court of Pennsylvania erred in holding as irrelevant and immaterial, and it is the duty of this Court to consider, appellant's proof as to the in-

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[13] *Newark Fire Insurance Co. v. State Board*, 307 U. S. 313, 319, 59 S. Ct. 918 (1939).

[14] 283 U. S. 123, 51 S. Ct. 385 (1931).

[15] 329 U. S. 416, 67 S. Ct. 444, reh. den. 329 U. S. 834 (1947).

herent arbitrariness of the Pennsylvania apportionment formula.

F. CONCLUSION.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal; that the questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution; and that, if the appeal should be considered as improvidently taken, the Court should consider it as a petition for certiorari; and appellant prays that final judgment of the Supreme Court of Pennsylvania be reversed and for such other relief as may be fit and proper.

Roy J. Keefer,
Hull, Leiby and Metzger,
208 Walnut Street,
Harrisburg, Pa.

APPENDIX A.

TEXT OF PENNSYLVANIA STATUTE INVOLVED.

Sections 2 and 3 of the Act of May 16, 1935, P. L. 208, as Re-enacted and Amended by the Act of December 27, 1951, P. L. 1746, 72 Purdon's Pennsylvania Statutes §§ 3420b and 3420c.

AN ACT

To reenact the title and to reenact and further amend the act, approved the sixteenth day of May, one thousand nine hundred thirty-five (Pamphlet Laws 208), entitled, as amended, "An act to provide revenue for State purposes by imposing an excise tax, for a limited period of time, on the net income of certain corporations, * * *" * * *.

Section 2. Definitions.—The following words, terms, and phrases, when used in this act, shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning.

* * * *

"Net Income." 1. In case the entire business of the corporation is transacted within this Commonwealth, net income for the calendar year or fiscal year as returned to and ascertained by the Federal Government, or in the case of a corporation participating in the filing of consolidated returns to the Federal Government, the net income which would have been returned to and ascertained by the Federal Government if separate returns had been made to the Federal Government for the current and prior taxable years subject, however, to any correction thereof, for fraud, evasion, or error as finally ascertained by the Federal Government: Provided, That except as hereinafter otherwise

provided additional deductions shall be allowed from net income on account of any Federal income or excess profits taxes paid after deducting therefrom an amount equivalent to any post-war refunds applicable to any such taxes during such calendar or fiscal year for the preceding calendar or fiscal year, or accrued during such calendar or fiscal year for such year, as the case may be, *and on account of any dividends received from any other corporation:* * * *. (Emphasis supplied.)

2. In case the entire business of any corporation, other than a corporation engaged in doing business as an insurance or surety company, is not transacted within this Commonwealth, the tax imposed by this act shall be based upon such portion of the net income of such corporation for the fiscal or calendar year, as defined in clause one hereof, as may be determined by allocations and apportionments made as follows:

(a) Gains realized and losses sustained from the sale or exchange of capital assets, if such assets consist of real estate or tangible personal property situated in the Commonwealth, shall be allocated to this Commonwealth.

(b) Gains realized and losses sustained from the sale or exchange of capital assets, if such assets consist of real estate or tangible personal property situated outside of the Commonwealth, shall not be allocated in any part to this Commonwealth.

(c) The remainder of such net income shall be divided into three equal parts.

(1) Of one-third, such portion shall be attributed to business carried on within this Commonwealth, as shall be found by multiplying said one-third by a fraction, whose numerator is the value of the corporation's tangible property situated within this Commonwealth, and whose denominator is the value of all the corporation's tangible property wherever situated.

(2) Of one-third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said one-third by a fraction, whose numerator is the expenditures of the corporation for wages, salaries, commissions and other compensation to its employes, and assignable to this Commonwealth as hereinafter provided, and whose denominator is the total expenditures of the corporation for wages, salaries, commissions, and other compensation to all its employes.

(3) Of the remaining third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's gross receipts from business assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business.

* * * *

The amount assignable to this Commonwealth of expenditures of the corporation for wages, salaries, commissions, or other compensation to its employes, shall be such expenditures for the taxable year as represent the wages, salaries, commissions, or other compensation of employes, not chiefly situated at, connected with, or sent out from, premises for the transaction of business maintained by the corporation outside the Commonwealth.

The amount of the corporation's gross receipts from business assignable to this Commonwealth shall be, (1) the amount of its gross receipts for the taxable year except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with, or sent out from, premises for the transaction of business maintained by the taxpayer outside of the Commonwealth, and except rentals and royalties, and interest and dividends, (2) rentals or royalties from property situated, or from the use of patents, within this Commonwealth, and

(3) dividends and interest, except such dividends and interest attributable to the business conducted on premises maintained by the taxpayer outside the Commonwealth * * * *.

* * * *

A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditures of a corporation for wages, salaries, commissions, or other compensation, or the gross receipts of the corporation are found to be situated, incurred or received without the Commonwealth.

Section 3. Imposition of Tax.—Every corporation shall be subject to, and shall pay for the privilege of doing business in this Commonwealth, or having capital or property employed or used in this Commonwealth, by or in the name of itself, or any person, partnership, association, limited partnership, joint-stock association, or corporation, a State excise tax * * * at the rate of five per centum per annum upon each dollar of the net income of such corporation received by, and accruing to, such corporation during the calendar years * * * *one thousand nine hundred and fifty three,* * * *.

APPENDIX B.

COPY OF OPINION AND JUDGMENT BELOW.

(As reported in 397 Pa. 523; 156 A.2d 328; headnotes and names of counsel omitted.)

Commonwealth v. Koppers Company, Inc., Appellant.

Argued May 25, 1959. Before JONES, C.J., BELL, MUSMANNO, JONES, COHEN and BOK, JJ.

Appeal, No. 56, May T., 1959, from judgment of Court of Common Pleas, No. 454, Commonwealth Docket, 1956 in case of Commonwealth of Pennsylvania v. Koppers Company, Inc. Judgment affirmed; reargument refused December 31, 1959.

Proceedings on appeal by taxpayer from decision of Board of Finance and Revenue refusing to review tax resettlements. Before Richards P.J., without a jury.

Adjudication filed dismissing appeal, defendant's exceptions to adjudication dismissed and final decree entered. Defendant appealed.

Opinion by Mr. Justice Cohen, November 24, 1959:

This appeal is from the decision of the Court of Common Pleas of Dauphin County sustaining the denial by the Board of Finance and Review of the Koppers Company's petition for review of the resettlement of corporate net income tax due by the company for the year 1953 under the provisions of the Corporate Net Income Tax Act of May 16, 1935, P. L. 208, as re-enacted and amended by the Act of December 27, 1951, P. L. 1746, 72 P. S. Section 3420a, *et. seq.*

This appeal challenges the makeup of the gross receipts allocation fraction as well as the constitutionality of the tax statute as construed and the tax resettlements made thereunder.

Under section 2 of section 3420b of the Corporate Net Income Tax Act, the net income of a corporation transacting part of its business in Pennsylvania and part of its business outside of Pennsylvania is apportioned to Pennsylvania by the use of three fractions, *i.e.*, tangible property, wages and salaries, and gross receipts. Section 2(a) first provides for the specific allocation to Pennsylvania of gains or losses from the sale or exchange of tangible capital assets situated within the Commonwealth. Section 2(b) provides that if such assets are situated without the Commonwealth, that gains or losses therefrom shall not be allocated within Pennsylvania. The remainder of the net income, referred to in tax parlance as "net income to be allocated," is then divided into three equal parts. Section 2(c). To each part is applied one of the three fractions heretofore mentioned.

The exact makeup of the gross receipts fraction is set forth in section 2(c) (3).[1] The instant controversy concerns the inclusion of certain items in both the numerator and the denominator of the gross receipts fraction, which inclusion has resulted in a larger allocation percentage and, hence, a greater tax imposed upon the company.

The facts surrounding the present appeal have been stipulated to by the parties and are, in pertinent part, herein summarized:

The Koppers Company is a foreign corporation (Delaware) which has registered in and is qualified to do business in Pennsylvania. During the taxable year 1953, the company was engaged within and without the Commonwealth in the manufacture and sale of chemicals, coke and by-products from coal. Its financial affairs were handled

---

[1] "(3) Of the remaining third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's gross receipts from business assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business."

from its principal office in Pittsburgh. The company's tax report for 1953 reported $\frac{76,994,163}{266,604,533}$ as its third or gross receipts fraction and an allocating percentage of .288795. Thereafter, the state tax departments made a resettlement of the account and changed the gross receipts allocation fraction to wit: amounts reported for dividends received and for interest from U. S. obligations were adjusted, and new items were added to the numerator and denominator. These latter items consisted of gross proceeds from sales of tangible assets, from sales of stocks and bonds and from maturities of U. S. 91-Day Treasury Bills. As a result of adding the new items to the gross receipts allocation fraction the total fraction became $\frac{141,748,838}{331,883,135}$ and the allocating percentage became .427105. Later, as a result of filing by the company of a Report of Change in Federal Net Income, a second resettlement of the account was made; and the same allocation fraction as used in the first resettlement was applied to the adjusted net income. It is this second resettlement which is at issue in the instant case.

The company complains essentially of six items which it contends are not properly includible in the gross receipts allocation fraction. They are (1) dividends received; (2) interest from U. S. obligations; (3) interest from state and municipal obligations; (4) sale of tangible assets; (5) sale of stocks and bonds; and (6) proceeds from the 91-Day U. S. Treasury Bills. Although the company included some dividends and interest in the gross receipts fraction in its filed tax return, the inclusion of the full amounts of the six items increased the allocation percentage of the gross receipts allocation fraction from .288795 to .427105 or by .138310 as a result of the first resettlement. However, the *total* exclusion of the six items from the allocation fraction used in the second resettlement would reduce the fraction from .427105 to .287084 or by .140021. Moreover, the six items were treated by the tax depart-

ments in the two tax resettlements as "gross receipts" within the purview of the tax statute and were included in the numerator and denominator of the gross receipts allocation fraction although *no income or gains from these sources were included in the total statutory tax measure—"Net Income to be allocated."*

In addition to the contention that the six items are not allocable factors in the gross receipts fraction, the company also urges that the tax statute is not only arbitrary, unreasonable and in violation of due process of law, but also that it is violative of the uniformity and equal protection of the laws clauses of the Federal and State Constitutions and is discriminatory against the obligations of the United States Government owned by the company.

In *Commonwealth v. Rockwell Manufacturing Co.*, 71 Dauph. 67, *aff'd* 392 Pa. 339, 140 A.2d 854 (1958), it was ruled that the proceeds from the sale or redemption of securities were properly included in the numerator and denominator of the gross receipts fraction. This determination was based upon two previous decisions of the Dauphin County Court—*Commonwealth v. Electric Storage Battery Co.*, 51 Dauph. 201, (1941), and *Commonwealth v. Eaglis Corporation*, 55 Dauph. 356, (1944), both arising under the foreign franchise tax act. In the *Eaglis* case the Commonwealth had included the proceeds from the sale of the securities in the numerator and the denominator of the gross receipts fraction and this action was sustained by the court. In the *Electric Storage Battery* case the court held that the proceeds from the securities were sales and that sales of securities fell within the term "sales" as used in the franchise tax act.

We think that the court below properly included the gross proceeds from the conversion of assets by sale or maturity and the gross income from investments as gross receipts for the purpose of constituting and determining the gross receipts allocation fraction.

Highly refined and technical tax concepts have been

developed by the accountant and legal technician primarily because of the impact of federal income tax legislation. However, this in no way should affect or control the normal usage of words in the construction of our statutes; and we see nothing that would require us not to include the proceeds here in question in the gross receipts allocation fraction unless statutorily such inclusion is prohibited. Under the ordinary basic methods of handling accounts, the term gross receipts, in the absence of any statutory definition of the term, must be taken to include the whole total gross receipts without any deductions. In 1956, under the provisions of the Act of March 6, P. L. 1247, 72 P. S. §3420b, section 2(c) (3) of the Corporate Net Income Tax Act was amended to proscribe the inclusion of gross proceeds from sales, redemptions, maturities or exchanges of securities as allocation factors in the gross receipts fraction. To us this is clearly indicative of the fact that prior to this 1956 enactment, the inclusion of those items in the gross receipts fraction was not statutorily proscribed. Had they not been proscribed from inclusion after 1956 by the amending act, the normal definition of gross receipts would have dictated their inclusion at all times.

We come to the same conclusion pertaining to interest and dividends. The exemption of dividends and interest from taxation, through their exclusion from net income to be allocated, does not also exclude these items from the gross receipts from business activity of the corporation. We determine, therefore, that all six items were properly included in the gross receipts fraction.

Beyond this problem of interpretation, the company raises several claims of violation of the federal and state constitutions. Its contentions may be summarized thusly: (1) inclusion of the six items is arbitrary since the items bear no relationship either to the amount of business done in Pennsylvania or to the net income to be allocated; (2) inclusion of the six items produces a gross receipts allocation fraction which allocates an unreasonbly disropor-

tionate amount of taxable net income to Pennsylvania; (3) because some other taxpayers did not include the gross proceeds of securities in their 1953 returns, the uniformity clause of the state Constitution and the equal protection clause of the federal Constitution is violated; and (4) inclusion of the maturities or redemption of United States securities in the gross receipts fraction imposes a discriminatory burden on these obligations.

The gross receipts fraction, as well as the tangible property and wages and salaries fractions, is part of a method used to apportion the income of a corporation doing business in more than one state so that each state may base its tax on only a portion of the income, a portion considered allocable to that state. Use of the three fraction formula has been held reasonable and valid: *Butler Bros. v. McColgan,* 315 U. S. 501, 86 L. Ed. 991 (1942), and *Turco Paint & Varnish Co. v. Kalodner,* 320 Pa. 421, 184 Atl. 37 (1936), even though that formula may not precisely measure the corporation's income actually attributable to the taxing state. *Guaranty Trust Co. v. Virginia,* 305 U. S. 19, 83 L. Ed. 16 (1938), just as in cost accounting it becomes almost impossible to make a completely accurate cost analysis, so here in the allocation of income to the various taxing states there is usually some overlapping by the several states, which results in the imposition of a tax on more than 100% of the corporation's income. This is not constitutionally fatal and would only be declared so when there has been an unreasonable distortion of income.

Secondly, all three fractions are designed as measures of corporate activity in the taxing state. We have had occasion to point out that the fractions as used in the Corporate Net Income Tax Act are the same as those used in the foreign franchise tax act. *Commonwealth v. American Telephone & Telegraph Co.,* 382 Pa. 509, 515, 115 A.2d 373, 375 (1955). In construing the latter act we have noted that intangibles which are a necessary part of corporate activity and are within the framework of the corporate

functioning, actively or as reserve, may be considered in determining the tax. *Commonwealth v. Columbia Gas & Electric Corporation,* 336 Pa. 209, 223, 8 A.2d 404, 412, (1939). In this respect there exists no requirement that gross receipts from "business" be so narrowly defined as to exclude from the gross receipts fraction everything not directly attributable to the company's construction work or to its manufacture and sale of chemicals, coke and by-products of coal.

Appellant would also require some direct relationship between the specific elements includible in the tax base-net income- and those includible in the fractions. This view is too restrictive. All that the Constitution here requires is that the fractions be composed of elements contributing to the business activity of the company. The six items in question here meet this test.

In the present case the Commonwealth's resettlement resulted in an increase in the combined allocation percentage from approximately 30% to approximately 34.6%. Appellant must show that this change produces an allocation of income to Pennsylvania so disproportionate to the actual income attributable to the state that it is inherently unreasonable. The contention that each of the three fractions must separately meet such a test overlooks the fact that it is precisely because one of the fractions may distort the allocation that three fractions are used. The fairness of such a method has long been upheld, *Butler Bros. v. McColgan, supra;* and appellant has produced no facts showing an unreasonable distortion of income here.

As for the alleged violation of the uniformity and equal protection clauses of the state and federal Constitutions, appellant shows no more than the Commonwealth admits—that through lack of knowledge or information either at any time or until the period for resettlement had passed, some taxpayers, similar to the appellant, succeeded in paying a tax which did not reflect the inclusion of gross proceeds of securities in the gross receipts fraction.

Whether this fact resulted from a lack of comprehensive investigative procedures by the Commonwealth or from withholding of information by taxpayers which could not reasonably be discoverable within the allowable period, it is far from the result of a deliberate, purposeful discrimination in the application of the tax which must be shown before the constitutional safeguards are violated. Mere error by a taxing officer in applying a statute which imposes the same tax base and the same rate of tax on all corporations similarly situated does not infringe upon these protections. See *Commonwealth v. Budd Company,* 379 Pa. 159, 173, 108 A.2d 563, 569 (1954).

Appellant's final constitutional argument is that the inclusion of the proceeds from maturities of federal securities in the gross receipts fraction results in discrimination against United States obligations and is, hence, unconstitutional. There are several answers to this. First, appellant did not raise this question in its statement filed pursuant to Rule 40 of the rules of this Court and may be deemed to have waived it. Secondly, apart from this, the Corporate Net Income Tax Act does not tax the income from federal securities. Such a tax while simultaneously excluding the income from state and municipal securities, would be discriminatory and has been so held. *Commonwealth v. Curtis Publishing Co.,* 363 Pa. 299, 69 A.2d 410 (1949). Therefore, income from all three sources is excluded from the income taxed. Lastly, proceeds from all securities in which the corporation invests are included in the gross receipts fraction, thus avoiding any trace of discrimination. For these reasons we find no merit in appellant's contention.

Appellant also complains that the court below erred in affirming the Commonwealth's thirteenth request for conclusions of law. While we feel that such request and affirmance were unnecessary in this case, we do not see how appellant has been injured. All of the matters in question were contained in a stipulation of facts entered into by the

parties and placed before the court. The Commonwealth's objection to their relevancy and materiality was sustained only after the court had given its decision on the law and had considered the facts contained in the stipulation. The court's exclusion of these facts pursuant to the Commonwealth's request was, therefore, simply a decision that those facts had ultimately proved immaterial in view of the legal conclusions stated. It in no way prejudiced the appellant.

Judgment affirmed.

APPENDIX C.

PETITION FOR REARGUMENT AND ORDER ENTERED IN SUPREME COURT OF PENNSYLVANIA, NO. 56, MAY TERM, 1959.

Petition of Apellant for Reargument (Filed December 3, 1959.)

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

The petition of Koppers Company, Inc., appellant in the above case, by its attorneys, Roy J. Keefer and Leon D. Metzger, respectfully requests your Honorable Court to grant to it a reargument for the reasons set forth below. The judgment of the lower court was affirmed by this Court on November 24, 1959.

Appellant's reasons for reargument are that: (1) this Court has misapprehended or overlooked the inherent arbitrariness of the use of the six disputed gross income and gross proceeds items as allocation factors in the gross receipts allocation fraction and the resulting violation of due process; (2) it overlooked and disregarded an important fact stipulated by the parties involving duplication of allocation factors and the resulting violation of due process; (3) it has misapprehended the ground on which appellant claims that the United States securities owned by it have been discriminated against; and (4) it has erred in overruling other issues raised by appellant.

I. The use of the six disputed gross income and gross proceeds items as allocation factors makes the gross receipts allocation fraction inherently arbitrary and results in violation of due process.

The six disputed items consist of dividends received, interest from United States obligations, interest from

state and municipal obligations and three gross proceeds items, the most important one of which is maturities of $63,679,567.79 from 91-day U. S. Treasury Bills; and no income or gains from these sources were included in the tax measure which consisted of "net income to be allocated" (S/F, Paragraph 12, R. 53a).

When, as in the instant case, a state seeks to levy an excise tax on a multi-state integrated foreign corporation for the privilege of doing business within its borders, selects net income of the foreign corporation as its "tax measure"; and bases its tax upon the portion of the "measure" attributed to business carried on by it in the state, the selection of an apportionment formula giving representation to, and completely identifying, all income factors and income activities is practically impossible in the realms of economics and administration. Under these circumstances, it is an established concept that, unless the apportionment formula does give representation to and does completely identify all income factors and income activities, the allocation criteria selected must be representative of major income producing factors (see appellant's Brief, Pages 33, 34 and 35). The cases of *Butler Bros. v. McColgan,* 315 U. S. 501 (1942) and *Turco Paint & Varnish Company v. Kalodner,* 320 Pa. 421 (1936) support this fundamental principle (appellant's Brief, Pages 33-35).

This Court, in the instant case, has misapprehended this fundamental concept in the selection of allocation criteria to apportion a tax measure consisting of net income. Here, by reason of statutory provisions or court decisions (see appellant's Brief, Pages 18 and 19), all income or gain from the six disputed gross income and gross proceeds allocation items are excluded from the amount of net income to be used as the tax measure, and yet, despite this fact, the six disputed gross income and gross proceeds items are used as allocation factors in the gross receipts allocation fraction to allocate one-third of appellant's net income arising from its business of construction work and

the manufacturing and selling of products. Hence, it is submitted that the six disputed allocation items are not appropriate allocation criteria to allocate appellant's operating net income and that their use makes the gross receipts allocation fraction inherently arbitrary, thereby resulting in violation of due process (see appellant's Brief, Pages 35, 36 and 37).

This leads us to look at the result of the use of the six disputed items as allocation criteria. For this purpose, we will use as an illustration the gross proceeds arising from the maturity of 91-day U. S. Treasury Bills.

The Record shows (S/F, Exhibit "F-3", R. 71a) that the average amount of capital invested by appellant in 91-day U. S. Treasury Bills was $17,907, 389; that of this average investment, $11,944,980, by reason of investment and reinvestment, produced gross proceeds of $47,726,256 which were not used during the tax year 1953 for any purpose in appellant's business.

Appellant has shown (Page 14, Note 8 of its Brief) that the use of the gross proceeds of $47,726,256 as an allocation item in the gross receipts allocation fraction assigns to Pennsylvania taxable income of $1,055,214.82, on which the tax is $52,760.74. Thus the tax is a little less than five times the amount of the average capital invested in the Treasury Bills, which produced the gross proceeds of $47,726,256. It is respectfully submitted that, contrary to this Court's opinion, the use of these gross proceeds makes the gross receipts allocation fraction inherently arbitrary and results in violation of due process by assigning to Pennsylvania net income which is not attributable to business done by appellant within the state.

2. This Court overlooked and disregarded a fact stipulated by the parties which proves duplication of allocation factors, thereby resulting in violation of due process.

Paragraph 17 of the Stipulation of Facts (R. 55a) reads as follows:

> "When capital in the form of investments in securities and tangible property is converted by sale, redemption or maturity into gross proceeds which are used by defendant for any purpose in connection with construction work and the manufacturing and selling of products, the benefits derived by defendant from such use contribute, in the same manner as other assets so employed, to the production of net income from such operations."

It is further stipulated by the parties, in Paragraph 7 of the Stipulation of Facts (R. 49a):

> "Defendant concedes that proceeds arising from maturities of United States Treasury 91-Day Bills, not reinvested in such Bills, were used for corporate purposes within and without Pennsylvania in construction work and in the manufacture and sale of chemicals, coke and by-products from coal."

These stipulations mean that, to the extent that the six disputed gross income and gross proceeds items were used in appellant's construction and manufacturing business, they contributed to the production of tangible property, wages and gross receipts from the sales of products which are themselves used as allocation factors in the tangible property, wages and gross receipts allocation fractions. Therefore, when the "bare bones" amounts of the six disputed items as such are used as allocation factors in the gross receipts allocation fraction, their use constitutes a duplication of allocation criteria, and such use per se results in violation of due process.

3. This Court has misapprehended the ground on which appellant claims that the United States securities owned by it have been discriminated against.

Even though the tax at issue is an excise or privilege tax and tax is not imposed directly upon United States securities, nevertheless, in the computation of the tax, United

States securities owned by the taxpayer or the income derived therefrom may be discriminated against. See *Commonwealth v. Curtis Publishing Co.*, 363 Pa. 299 (1949) cert. den. 339 U. S. 928, 70 Supreme Ct. 627. Furthermore, it has been held that a state may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities. See the *Curtis* case at Pages 310 and 311.

This Court ruled, in the present case, that there was no discrimination against United States securities owned by appellant because "Proceeds from all securities in which the corporation invests are included in the gross receipts fraction, thus avoiding any trace of discrimination."

This ruling by the Court misapprehends the grounds of discrimination advanced by appellant, which were:

(a) The investment by appellant in 91-day U. S. Treasury Bills constitute a loan from appellant to the government and the maturity of the Bills contemplates repayment of the loan.

(b) Keeping in mind that the average amount invested by appellant in 91-day U. S. Treasury Bills was only $17,907,389, maturities and reinvestments produced gross proceeds of $63,679,567 (R. 71a). As compared with long term industrial bonds which may not mature during the tax year or may mature only once, appellant, owning short term government securities, is subjected to a greater tax burden than if it owned long term industrial bonds.

(c) The tax authorities do not use as allocation factors in the make-up of the gross receipts allocation fractions gross proceeds from issuance by a corporation of its own stocks and bonds, from repayment of business loans and from short term borrowings from banks.

It is respectfully submitted that, on these grounds, there is just as much discrimination against the United States securities owned by appellant as in the *Curtis* case,

where the inclusion of interest from United States securities in the tax measure of net income and the exclusion of interest from municipal obligations from the tax measure was held to constitute discrimination against United States securities owned by the Curtis Publishing Co.

4. This Court has erred in overruling other issues raised by appellant (see appellant's Brief, Pages 20-29, 38-52).

For the reasons stated above, it is respectfully requested that this Court grant reargument to appellant in the instant case. Attached hereto is a copy of the Court opinion filed in this case on November 24, 1959.

/s/ LEON D. METZGER,
/s/ ROY J. KEEFER,
Attorneys for Appellant.

Order Entered on Petition for Reargument.

Petition denied December 31, 1959.

PER CURIAM.

APPENDIX D

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Office Supreme Court, U.S.
FILED
JUN 23 1960
JAMES R. BROWNING, Clerk

In The

Supreme Court of the United States

October Term 1960

No. 956 100

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

KOPPERS COMPANY, INC.,
Appellant

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS APPEAL

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

Commonwealth of Pennsylvania,
Appellee

v.

Koppers Company,
Appellant

MOTION TO DISMISS APPEAL

Appellee moves that the appeal from the final judgment of the Supreme Court of Pennsylvania in the present case be dismissed on the grounds that (a) the appeal does not present any substantial Federal questions; (b) the question which the appellant is seeking to have reviewed under Question 2 was not properly raised before the court below; and (c) that portion of the judgment of the court below which the appellant seeks to review under Question 3 rests on an adequate non-Federal basis.

STATEMENT

In the present case, the courts below[1] sustained the imposition of the Pennsylvania corporate net income tax against the appellant for 1953.

The Pennsylvania Corporate Net Income Tax Act imposes a "State excise tax * * * for the privilege of doing business in this Commonwealth."[2] The tax has as its base net income as returned to and ascertained by the Federal Government, subject to certain adjustments and allocations not material here. The resulting base is then apportioned by the use of 3 fractions, i.e., (1) tangible property, (2) wages and salaries, and (3) gross receipts.[3] The tax statute, as construed by the State Courts, required the inclusion of the gross proceeds of securities in the third or gross receipts fraction.[4]

The appellant here objected to the inclusion of the gross proceeds of securities in the gross receipts fraction, contending that this so increased the taxable proportion as to render the tax unconstitutional. The evidence before the court below showed that the inclusion of the gross proceeds of securities increased the combined allocation percentage from approximately 30% to approximately 34.6%. The court be-

[1] 71 Dauphin County Report 73 (1957); 397 Pa. 523, 156 A. 2d 328 (1959), Jur. St. Appendix B, pp. 23-31.

[2] §3 of the Act of May 16, 1935, P. L. 208, as amended, 72 P.S. §3420 (c), Jur. St. App. A, p. 22.

[3] Jur. St., pp. 19, 20, 21.

[4] Jur. St., p. 26.

low found that the appellant had "produced no facts showing an unreasonable distortion of income."[5]

The appellant also contends that the inclusion in the gross receipts fraction of the gross proceeds of the United States securities held by it resulted in an unconstitutional discrimination against such United States securities. The court below held that (1) the appellant had waived this question; (2) the tax is not imposed on income from Federal securities; and (3) proceeds of *all* securities are included in the gross receipts fraction.[6]

The appellant also complains about the action of the trial court in concluding that certain evidence before the court was irrelevant and immaterial. The Supreme Court of Pennsylvania held that the appellant had not been injured, and that the ruling was simply a decision that those facts had ultimately proved immaterial, in view of the legal conclusions previously stated.[7]

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[5] Jur. St., p. 29.
[6] Jur. St., p. 30.
[7] Jur. St., pp. 30, 31.

QUESTIONS PRESENTED

1. Under a State excise tax statute which measures business activity in Pennsylvania by the use of three apportionment fractions, and requires the inclusion in the gross receipts fraction of the gross proceeds of securities owned by the taxpayer, has the appellant sustained its burden of proving that such inclusions violate the Due Process Clause of the Constitution of the United States, when the record shows only an increase from 30% to 34.6% in the total allocation percentage of appellant's taxable income in Pennsylvania?

2. Did the inclusion of the gross proceeds of the appellant's United States securities in the gross receipts fraction result in an unconstitutional discrimination against such securities?

3. Did the State courts err in ruling that certain facts in the record were irrelevant and immaterial after having concluded that the tax levied against the appellant was not unconstitutional?

SUMMARY OF ARGUMENT

The appellant is seeking a review by this Court of the decision of the Supreme Court of Pennsylvania, which construed the Pennsylvania corporate net income tax apportionment formula as reasonable. The appellant made no attempt to show by what percentage its business activity in Pennsylvania should have been measured, but merely showed that the addition of the gross proceeds of the maturities of securities to the gross receipts fraction increased the overall apportionment by 4.6%.

This increase does not present a substantial Federal question of due process.

Moreover, there is no basis for appellant's contention that, by including the gross proceeds of its Federal securities in the gross receipts fraction, there has been discrimination against such Federal securities. On the contrary, the gross proceeds of all securities issued by the Federal, State or local government or by private corporations, are included without discrimination in the gross receipts fraction. Moreover, appellant did not properly raise this question before the Supreme Court of Pennsylvania.

The appellant also complains of a ruling on evidence made by the trial court. However, this ruling did not violate any of appellant's rights, because it was merely confirmatory of the decision of the court below, and did not prejudice the appellant.

ARGUMENT

1. FEDERAL CONSTITUTION REQUIRES ONLY A REASONABLE APPORTIONMENT

(Question 1)

If a rule of apportionment is applied for State excise tax purposes, the only requirement is that the formula be reasonable: *Butler Bros. v. McColgan*, 315 U. S. 501 (1942); *Norfolk & Western Ry. Co. v. North Carolina*, 297 U.S. 682, 688 (1936). Some rather narrow formulae for an allocation of income have been upheld, e.g., (a) a proportion of the taxpayer's real and intangible personal property located within the State: *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); (b) a proportion of real and tangible and intangible personal property; *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 266 U.S. 281 (1924).

Pennsylvania uses the three-fraction formula held reasonable in *Butler Bros. v. McColgan*, supra (315 U. S. 501). This formula was upheld in *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 184 A. 37 (1936).

A state statute will be held invalid only where there has been an unreasonable distortion of income. As said in *Butler Bros. v. McColgan*, supra (315 U.S. 507), "one who attacks a formula of apportionment

carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed".

In *Ford Motor Co. v. Beauchamps,* 308 U.S. 331 (1939), this Court recognized the apportionment doctrine, while sustaining an allocation nearly eight times the book value of the taxpayer's local property.

See also *International Harvester Co. v. Evatt,* 327 U.S. 416, 422 (1947), where this Court declared that "rough approximation rather than precision is sufficient".

In order to prove that the 34.6% fraction was unreasonable, appellant would have had to show that its business activity attributable to Pennsylvania was substantially less than this amount. It does not aid the appellant to pin-point an allegedly disproportionate result in one of the three fractions. The reason for having three fractions is to average out and compensate for the disproportionate result that would follow in many cases if only one or even two allocation fractions were used.

The only decision of this Court holding that the apportionment formula of a State had reached an arbitrary result in income taxation was *Hans Rees' Sons, Inc. v. North Carolina,* 283 U.S. 123 (1930), where the evidence showed that the income having its source in the operations of the taxpayer within the State of North Carolina was 17%, whereas the State tax formula allocated for the four years in question respectively 83+%, 85+%, 66+% and 85%. Such an increase of 68% in that case could scarcely be

compared with the 4.6% increase in the allocation on which the present litigation is based.

It is entirely possible that the 34.6% used in the resettlement is too low as a measure of the appellant's business activity in Pennsylvania. The appellant has offered nothing to refute this possibility. In commenting on this, the Pennsylvania Supreme Court said: "* * * appellant has produced no facts showing an unreasonable distortion of income here".[8]

[8] Jur. St., p. 29.

2. COMMONWEALTH'S TAX DOES NOT DISCRIMINATE AGAINST THE APPELLANT'S UNITED STATES SECURITIES (Question 2)

Appellant is here contending that the inclusion of the proceeds from maturities of Federal securities in the gross receipts fraction results in an unconstitutional discrimination against obligations of the United States.

As pointed out by the Supreme Court of Pennsylvania, the appellant did not raise this question in its statement filed pursuant to rule 40 of the Rules of that Court, and "may be deemed to have waived it."[9] Thus, under the laws of Pennsylvania, the question was not properly before the appellate court below.

Moreover, it should be noted that the act does not tax income from Federal, State or municipal securities. On this point, the Pennsylvania Supreme Court said:[9]

> "* * * Such a tax while simultaneously excluding the income from state and municipal securities, would be discriminatory and has been so held. Commonwealth v. Curtis Publishing Co., 363 Pa. 299, 69 A. 2d 410 (1949). Therefore, income from all three sources is excluded from the income taxed. * * *"

Finally, as the court below pointed out,[9] proceeds from all securities in which the corporation invests are included in the gross receipts fraction, thus avoiding any trace of discrimination.

[9] Jur. St., p. 30.

3. RULING THAT CERTAIN FACTS WERE IRRELEVANT AND IMMATERIAL DID NOT INJURE APPELLANT

(Question 3)

Appellant is here contending that the trial court erred in ruling that certain facts, agreed to by the parties in the Stipulation of Facts, were irrelevant and immaterial. Appellant does not indicate what section of the United States Constitution was allegedly violated by this ruling.

Nevertheless, the contention is adequately answered in the opinion of the Supreme Court of Pennsylvania, where it was stated:[10]

> "• • • All of the matters in question were contained in a stipulation of facts entered into by the parties and placed before the court. The Commonwealth's objection to their relevancy and materiality was sustained *only after the court had given its decision on the law and had considered the facts contained in the stipulation.* The court's exclusion of these facts pursuant to the Commonwealth's request was, therefore, simply a decision that those facts had ultimately proved immaterial in view of the legal conclusions stated. It in no way prejudiced the appellant." (Emphasis supplied)

In view of this adjudication, there can be no basis for review by this Court under Question 3.

[10] Jur. St., pp. 30, 31.

No substantial Federal questions have been presented by the Appeal in the present case. Accordingly, the appeal should be dismissed.

Respectfully submitted,
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ANNE X. ALPERN,
Attorney General,
Counsel for Appellee.

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Supreme Court, U.S.
FILED
JUL 8 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 100

KOPPERS COMPANY, INC.,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal from the Supreme Court of Pennsylvania

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 956

KOPPERS COMPANY, INC.,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal from the Supreme Court of Pennsylvania

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL.

In this appeal, appellant asserts that its rights under due process are violated by reason of the inherent arbitrariness of the make-up of the part of the Pennsylvania apportionment formula consisting of the gross receipts allocation fraction.

Appellee's Motion to Dismiss Appeal is not responsive to this issue. In the cases cited by Appellee (pages 6 and

7),[1] the selection of allocation criteria in the make-up of the state apportionment formula in each case was not attacked as being inherently arbitrary as is being done in the instant case. In the absence of such an attack and judicial determination on that point, those cases are not authorities approving the reasonableness of the Pennsylvania apportionment formula which is under attack in the present case.

Where appellant is attacking as inherently arbitrary the make-up of part of the Pennsylvania apportionment formula consisting of the gross receipts allocation fraction, it does not have the burden of proving, as claimed by appellee,[2] that the application to it of the *entire* apportionment formula produces an arbitrary and palpably disproportionate result. From what has been said by the Court in the *Butler Bros.* and *International Harvester* cases, its burden is limited to proof of arbitrariness which it submits has been met.[3]

The argument of appellee[4] that the use of three allocation fractions in an apportionment formula averages out and compensates for the disproportionate result produced by one or two of the fractions has no foundation in theory, fact or law; has not been sanctioned by this Court; and constitutes a device to tax extra-territorial values.

The Pennsylvania statute as construed by the state court is applied generally to all corporations similarly situated and, therefore, the issue of its inherent arbitrariness presents a substantial federal question.

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[1] *Butler Bros. v. McColgan*, 315 U. S. 501 (1942).
Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 (1920).
International Harvester Co. v. Evatt, 327 U. S. 416 (1947).
Turco Paint & Varnish Co. v. Kalodner, 320 Pa. 421, 184 A. 37 (1936).

[2] Motion to Dismiss Appeal, pages 6, 7 and 8.

[3] Jur. St., pp. 11-15, 17.

[4] Motion to Dismiss Appeal, p. 7.

Appellant's second issue involving discrimination against United States securities owned by it was raised and was decided adversely by the Pennsylvania Supreme Court [5] and, accordingly, is subject to review by this Court.

Wherefore, appellant prays that appellee's Motion to Dismiss Appeal should be denied; and that this Court should note jurisdiction to allow plenary consideration, with briefs on the merits and oral arguments.

Respectfully submitted,

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Hull, Leiby and Metzger,
208 Walnut Street,
Harrisburg, Pa.
Attorneys for Appellant.

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[5] Jur. St., p. 30.

KOPPERS COMPANY, INC., *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 100. Decided October 10, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 397 Pa. 523, 156 A. 2d 328.

Roy J. Keefer for appellant.

Anne X. Alpern, Attorney General of Pennsylvania, and *George W. Keitel*, Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.